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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RONALD SNYDER, as Trustee, etc.,

Plaintiff and Respondent,

v.

RUSSELL CAROLLO et al.,

Defendants and Appellants.

F059657

(Super. Ct. No. 08CEPR01056)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John Vogt, Judge.

Cyril Lawrence, Inc. and Cyril L. Lawrence for Defendants and Appellants.

Helon & Manfredo, Marvin T. Helon and Nicholas L. Lucich for Plaintiff and Respondent.

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Respondent, the trustee of decedent's inter vivos trust, petitioned the court for instructions and for approval of an accounting after a dispute arose as to the price at which respondent, as a beneficiary, was permitted to purchase the interests of appellants, two other beneficiaries, in the real property owned by decedent at the time of her death. The trial court approved the accounting and determined the purchase price should be based on the second appraisal obtained by the trust. Appellants appeal, contending the second appraisal did not conform to the requirements of the trust instrument; the accounting should not have been approved because it did not properly account for the income and expenses of the real property and improperly offset a deceased beneficiary's debt against his successor's share of the trust; and the trial court failed to order distribution of the trust assets. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Lucille Snyder executed a trust agreement creating the Lucille Snyder Family Trust. Lucille¹ was the initial trustee and the trust beneficiary during her lifetime. The trust provided that, on Lucille's death, after certain specific gifts were made, the residue of her estate was to pass to her four children, Theodore Snyder, Roseann McSwain, Ronald Snyder, and Jerry Snyder. Jerry's share was to be held in trust for him by Theodore and Ronald, because of Jerry's drug addiction. The primary asset of the trust was 193 acres of farmland with a modest residence on it. Lucille lived in the residence; Ronald leased the land from her and conducted farming operations there.

Around 2003, Lucille's health began to fail and she was placed in a convalescent care facility. Ronald became the successor trustee of the trust. Jerry had been living with Lucille, and Ronald became concerned about the furnishings of the house because Jerry had taken items from the house in the past. Ronald asked Jerry to move out, but Jerry

¹ Because many of the individuals involved share a last name, we refer to the participants by their first names. This is done for clarity and convenience; no disrespect is intended.

refused. Ronald discussed the situation with Roseann, Theodore, and Roseann's son, Russell Carollo. They agreed that the trust should buy Jerry a trailer and pay rent for a trailer park space, so that Jerry would vacate the house. The trust purchased the trailer and began to pay the space rent. Roseann and her husband moved into Lucille's house and lived there rent free for approximately one year, while their new house was being built. With the consent of Ronald as trustee, when Roseann moved out, she removed the furnishings, which the trust provided were to be hers on Lucille's death. Ronald then rented the house to third parties. The income from the house and farm was insufficient to pay the expenses of Lucille's care. Ronald borrowed \$30,000 from Lucille's sister's trust, the Margaret Wentworth Trust, in order to meet her expenses.

On August 20, 2007, Lucille died. In November 2007, Jerry died. The trust instrument provided that, on Jerry's death, the residue of his trust was to be distributed to his nephew, Russell.

The trust instrument gave Ronald and Theodore two options: an option to purchase the interest that Roseann would acquire in Lucille's real property and an option to purchase the interest Jerry's trust would acquire in Lucille's real property. Ronald and Theodore were required to exercise the options within six months of Lucille's death. The trust instrument set the option price for each interest at "twenty-five percent (25%) of the market value of my real property as appraised by an appraiser hired by the Trust," and prescribed how and when the payments were to be made. The trust's attorney obtained a probate referee's appraisal report from Steven Diebert, one of the probate referees for Fresno County. Diebert concluded the property had a value of \$975,000. In December 2007, Ronald exercised his option to purchase both interests.

Roseann and Russell objected to Diebert's valuation; they obtained an appraisal from Blaine Wilcox, a real estate appraiser, who opined the value of the real property was \$1,657,000. On February 15, 2008, in accordance with the time restraints set out in the trust instrument, and based on Diebert's appraised value, Ronald deposited in the trust's

bank account the down payment for Roseann's interest and the first installment payment for Jerry's interest. Thereafter, he continued to deposit the monthly installment payments for both interests in the trust, ceased to pay rent for the use of the farmland, and allocated all further income and expenses of the real property to his share and Theodore's share of the trust.

Because of Roseann's and Russell's challenge to the original appraisal, the trust obtained a second appraisal from Rick Smith, a certified general real estate appraiser and a probate referee for Fresno County. Smith provided a probate referee's appraisal report that concluded the value of the property was \$1,100,000. Roseann and Russell also obtained a second appraisal, from Richard Kilgore, a certified general real estate appraiser, who set the value at \$1,700,000.

On October 21, 2008, Ronald filed his petition to settle the account and obtain instructions concerning the option price. Roseann and Russell filed objections. They disputed the value of the real property for purposes of determining the option price, complained of the lack of details in the Diebert and Smith appraisal reports, complained of the failure to disburse funds to the beneficiaries, questioned certain trust expenditures, and objected to offsetting the cost of Jerry's trailer and space rental against Russell's share of the trust. In posttrial briefs, Roseann and Russell also contended Ronald commingled his own personal funds with the trust funds when he made payments on the option price into the trust; they contended he should not have deposited his option payments into the trust account, but should have paid them directly to Roseann and Russell.

The court determined Smith's appraisal was obtained by the trust, as provided in the trust instrument, and best addressed the issues; there was no reason to reject his valuation. The trial court adopted his \$1,100,000 valuation as the basis for determining the option price. It rejected Roseann's and Russell's claims of breach of fiduciary duties, approved the offset of Jerry's trailer expenses against Russell's share of the trust, and

approved the accounting, including the allocation of income and expenses to the individual shares of the trust assets. The court concluded depositing the payments toward the option price in the trust, with allocations of income and expenses to the individual beneficiaries, was the only appropriate action available to the trustee, given the objections of Roseann and Russell and the debts of the trust that prevented distribution. The court instructed the trustee to conclude the sale of Roseann's and Russell's interests in the real property based on the Smith valuation, authorized Ronald to make the payments to the trust until all trust expenses are paid, and authorized him to deduct from those payments all expenses chargeable to Roseann's and Russell's shares. Judgment was entered and Roseann and Russell appeal.²

DISCUSSION

I. Standard of Review

The interpretation of a written instrument, including a trust instrument, presents a question of law subject to independent review by the appellate court, unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein. (*Poag v. Winston* (1987) 195 Cal.App.3d 1161, 1173.)

Issues of fact are subject to substantial evidence review. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452.) "Under the substantial evidence standard of review, we review the entire record to determine whether there is substantial evidence supporting the jury's factual determinations [citation], viewing the evidence and resolving all evidentiary conflicts in favor of the prevailing party and indulging all reasonable inferences to uphold the judgment [citation]. The issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact. [Citation.] Credibility is

² Theodore did not oppose Ronald's petition and he is not a party to this action or the appeal.

an issue of fact for the trier of fact to resolve [citation], and the testimony of a single witness, even a party, is sufficient to provide substantial evidence to support a factual finding [citation].” (*Fariba v. Dealer Services Corp.* (2009) 178 Cal.App.4th 156, 170-171.)

II. Market Value of Real Property

Roseann and Russell contend the probate referee reports prepared by Diebert and Smith are not “appraisals” as called for in the trust instrument, because they are brief reports containing the appraisers’ conclusions as to value, but not containing the supporting data or an explanation of the methodology used in reaching that conclusion. They assert Diebert’s and Smith’s reports do not conform to the definition of “appraisal” found in Business and Professions Code section 11302 or to the requirements of the Uniform Standards of Professional Appraisal Practice (USPAP). Further, they assert Smith “set a value of the Trust real property ... without following the procedures required by the [USPAP]” and, when challenged, defended “the value he set in his report by presenting evidence which he obtained *after* he originally made his determination.”

To the extent appellants contend Smith set an arbitrary value in his report, and only later obtained the information to support it, we reject their claim. They cite nothing, and we have found nothing, in the record to support such an accusation.

“In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it. [Citation.] Ordinary words must be given their normal, popular meaning and legal terms are presumed to be used in their legal sense.” (*Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 168; Probate Code, § 21102.) “[E]xtrinsic evidence as to the circumstances under which a written instrument was made is admissible to interpret the instrument, although not to give it a meaning to which it is not reasonably susceptible.” (*Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 453.)

The trust instrument provided: “The option price, for each interest, shall be twenty-five percent (25%) of the market value of my real property as appraised by an appraiser hired by the Trust.” Timothy Born, the attorney who drafted the trust instrument, testified Lucille told him she wanted the trust to be the same as her 1993 will, with specified changes. He copied language from the will and made changes to it. The will had contained an option for Ronald and Theodore to purchase Jerry’s and Roseann’s interests in Lucille’s real property. It provided: “The option price, for each interest, shall be that sum as appraised by the estate court appointed appraiser.” Born changed “the estate court appointed appraiser” to “an appraiser hired by the Trust,” because there would be no probate and no automatically appointed estate appraiser; the trust would have to hire an appraiser.

An appraiser is “[a]n impartial person who estimates the value of something, such as real estate, jewelry, or rare books.” (Black’s Law Dict. (9th ed. 2009) p. 117.) Black’s Law Dictionary does not separately define “appraise,” but it defines an appraisal as “[t]he determination of what constitutes a fair price; valuation; estimation of worth.” (*Ibid.*) In accordance with the ordinary meaning of the words, we construe the phrase “the market value of my real property as appraised by an appraiser,” as used in the trust instrument, to mean the fair market value of the property as estimated by an impartial person experienced in valuing that type of real property. We interpret the phrase “hired by the Trust” to mean the appraiser was to be selected and paid by the trust to prepare the estimate of the value of the property. There was no evidence the trustor intended these terms to be construed in some technical or other sense.

The trustee first hired Diebert, a probate referee, to determine the value of the real property. In response to objections by Roseann and Russell, who apparently challenged the valuation because Diebert was not a licensed real estate appraiser, the trustee hired Smith, a certified general real estate appraiser who was also a probate referee, to appraise the real property. Probate Code section 16247 authorizes a trustee to hire “appraisers

(including probate referees appointed pursuant to Section 400),” to assist the trustee in the performance of his duties. Appellants have not challenged Smith’s impartiality or qualifications. They did not demonstrate that he was not qualified as an “appraiser” as that term is used in the trust instrument.

Appellants challenge the form of the appraisal report prepared by Smith and the value he assigned to the property. They contend the USPAP requires an appraisal to contain sufficient information to understand the report, disclose the assumptions on which it is based, and describe the information analyzed, methodology used, and reasoning supporting the analysis and conclusion of value. Appellants complain that Smith’s report presented only his conclusion as to the value of the property, and did not contain the supporting data or a detailed explanation of the basis of his conclusion, which they contend is required by both Business and Professions Code section 11302 and the USPAP.

Business and Professions Code section 11302, subdivision (b), defines the term “appraisal” for purposes of licensing and certifying real estate appraisers. It defines an “appraisal” as “a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion in a federally related transaction as to the market value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.” Anyone engaged “in federally related real estate appraisal activity” must be licensed.³ (Bus. & Prof. Code, § 11320.) Federally related real estate appraisal activity is the process of making an appraisal of real property in a real estate-related financial transaction involving a federal financial institution. (Bus. & Prof. Code, § 11302, subds. (i), (j).) None of the appraisals presented in this case by any appraiser complied with the definition in Business and Professions Code section

³ The definition of “license” includes “certificate.” (Bus. & Prof. Code, § 11302, subd. (k).)

11302, subdivision (b), because none “set[] forth an opinion in a federally related transaction.” Business and Professions Code section 11302 does not provide an appropriate definition of “appraisal” for purposes of interpreting the trust instrument in this case.

The USPAP “constitute the minimum standard of conduct and performance for a licensee in any work or service performed that is addressed by those standards.” (Bus. & Prof. Code, § 11319.) The part of the Business and Professions Code that contains the definition of appraisals, the licensing requirement, and the requirement of compliance with the USPAP is expressly made inapplicable to probate referees, unless the appraised transaction is federally related. (Bus. & Prof. Code, § 11302, subd. (b).) Thus, the definition of “appraisal” found in Business and Professions Code section 11302, subdivision (b), and the requirement of compliance with the USPAP apply to appraisals performed for federally regulated financial institutions, and do not apply to the work of a probate referee if no such financial institution is involved.

The Probate Code consistently uses the terms “appraise” and “appraisal” to describe the work of the probate referee. (See, e.g., Prob. Code, §§ 451, 2943, 8900, 8902-8906, 8908-8909, 13052, 13152, 16247.) Neither term is defined in the Probate Code. Both Diebert and Smith presented their appraisals on a form entitled “Appraisal Report of California Probate Referee.” They testified it is customary for a probate referee’s report to be brief and to include only the conclusion as to value; the details of the referee’s analysis and the supporting data are kept in the referee’s working file. Both Diebert and Smith testified at length to the methods they used in arriving at their valuations. Smith testified that, although as a probate referee he is exempt from the USPAP, his job was still to make an independent determination of the fair market value of the property; if he had instead provided his opinion in a report written as a state certified appraiser governed by the USPAP, his opinion of the value of the property would have been the same.

Smith testified at length to the information he had about Lucille's property and properties in the area in general; the methodology he used in obtaining information about comparable sales of other real property; and his process of analyzing all the information to arrive at a determination of the value of the property. Appellants presented two appraisal reports and the testimony of the appraisers in an attempt to show the weaknesses in Smith's methodology and discredit his valuation.⁴ The four appraisers disagreed about the effect on the value of the property of various conditions, such as the availability of Consolidated Irrigation District water, the age and condition of the residence, and potential uses of the property. Aside from appellants' contention that the appraisal should not have been presented in the form of a probate referee's appraisal report, however, appellants have not identified any aspect of Smith's work that was not properly performed.

Although Smith presented his written appraisal in the form of a probate referee's appraisal report, which did not contain as much detail as an appraisal report that is subject to the USPAP, he supplied the missing details in his testimony at trial, demonstrating a sufficient basis for his conclusion as to the value of the real property. To reject Smith's appraisal because of the form of the report, even though he performed a proper appraisal and subsequently provided the supporting data and explanation, would be to exalt form over substance. Substantial evidence supports the trial court's conclusion that Smith was hired by the trust to appraise the property, and there was no reason to reject his opinion as to the value of the property. It did not err in concluding Smith's appraisal should be used as the basis for calculating the price to be paid for Roseann's and Russell's shares of the trust's real property pursuant to the option.

⁴ The trial court admitted the testimony of appellants' appraisers "for the limited purpose of impeaching the competency or sufficiency of the evaluations provided by Trust retained appraisers."

III. Commingling of Assets

Appellants contend that, by approving the trustee's practice of accepting option payments from Ronald and depositing them in the trust account, and by authorizing the trustee to continue doing so, the court sanctioned commingling of Ronald's individual funds with the funds of the trust. They assert Ronald, as beneficiary, should have made the payments toward the option price to Roseann and Russell directly, and the trust should not have been involved; they contend the payments are the property of Roseann and Russell, and are not assets of the trust.

The dispositive provisions of the trust instrument include the following:

"D. Upon the death of the Trustor, the Trustee shall distribute the remaining principal and income, if any, and continue the trust for the benefit of the beneficiaries hereinafter named, under the terms and conditions as follows:

"(1) The Trustee shall pay or reserve sufficient funds to pay all expenses of management and administration of the trust estate, including the compensation of the trustee and attorney

"(2) On the death of the Trustor, except as otherwise herein provided, the trust shall terminate and all of the trust estate shall be distributed as follows: [¶] ... [¶]

"(d) All the rest and residue shall be distributed into equal shares as follows"

The trust instrument then designates one share each for Theodore, Roseann, and Ronald, and one share to be held in trust for Jerry. The option provision states:

"A. I give to my sons, [Theodore and Ronald], two options, one to purchase the entire interest that the Trust for my son, [Jerry], will acquire in my real property; and the second to purchase the entire interest that my daughter, [Roseann] or her issue, will likewise acquire in my real property....

"B. These options must be exercised within six (6) months of the date of my death, and if not so exercised, they shall lapse at which time the property shall be distributed as stated next above."

The trust instrument expresses the intent that the expenses of the trust are to be paid out of the assets of the trust. After certain specific gifts are made, the residue is to be distributed equally to, or for the benefit of, Lucille's four children; if the option was not exercised within six months of the trustor's death, the option would lapse and, again, the residue would be distributed in equal shares to the four children. Thus, if the option was not exercised, the clear intent of the instrument was that payment of the expenses of the trust would reduce the residual shares of all the beneficiaries equally.

The option provision states:

“(1) My daughter shall be paid her interest ... twenty-five percent (25%) of the value of her one-quarter interest in said property not later than six (6) months after my death, and the balance in sixty (60) equal monthly installments

“(2) The Trust for my son, [Jerry], shall be paid its sales price ... in equal monthly installments the first monthly installment shall be paid on the same date as the first installment is paid to my daughter, with equal monthly installments thereafter”

Apparently based on this language, appellants contend Ronald's option payments were to be paid directly to Roseann and Russell, and were not assets of the trust from which its expenses could be deducted. Such a construction would have the effect of shifting to Ronald and Theodore the entire burden of the trust's expenses. Nothing in the trust instrument indicates Lucille intended to treat the four residual shares other than equally.

The option provision permitted Ronald or Theodore or both to purchase the interests Jerry's trust and Roseann “will acquire” in the real property. Otherwise, the property would be distributed to the four beneficiaries. We interpret the trust language as anticipating a transaction carried out by or through the trust, before any distribution of property to the beneficiaries. At the time the option was exercised and the first payments were made, the interests in the real property had not been distributed to any beneficiary; the property was still owned by the trust and could only be sold by it. The proceeds of

the sale by the trust of an interest in the real property would constitute assets of the trust. (See, *Heaps v. Heaps* (2004) 124 Cal.App.4th 286.) Consequently, we reject appellants' contention that the option payments were not assets of the trust out of which its expenses could be paid or amounts could be reserved for payment of expenses; we also reject the contention that the trustee commingled assets belonging to Ronald personally with the assets of the trust.

IV. Offset of Jerry's Debt Against Russell's Interest

At trial, Ronald and Theodore testified that, in order to remove Jerry from Lucille's home, both to protect the furnishings and to rent the house for the benefit of Lucille and the trust, the trust purchased a trailer for Jerry and paid to rent a trailer park space for him. Ronald further testified that Jerry orally promised to repay those costs out of his share of the trust. The trial court concluded Jerry's interest in the trust, to which Russell succeeded, is subject to an offset for the amounts the trust advanced to him for the trailer and space rental. Appellants contend that, in order to offset a debt against Jerry's share of the trust, the debt must be a bona fide debt. They contend the debt for Jerry's trailer and space rental is not a bona fide debt because the agreement that gave rise to it was not in writing as required by the statute of frauds, and the statute of limitations has run on the debt.

Civil Code section 1624 lists certain types of contracts that "are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent." Appellants claim Civil Code section 1624, subdivision (a)(1), required that Jerry's agreement to repay the cost of the trailer and space rental out of his share of the trust be made in writing. That subdivision requires a contract to be in writing if it is "[a]n agreement that by its terms is not to be performed within a year from the making thereof." (Civ. Code, § 1624, subd. (a)(1).) "[T]his portion of the statute of frauds 'applies only to those contracts which, by their terms, cannot possibly be performed within one year.' [Citation.]" (*Foley v. Interactive Data*

Corp. (1988) 47 Cal.3d 654, 671.) To apply, ““there must not be the slightest possibility that [the agreement] can be fully performed within one year.”” (*White Lighting Co. v. Wolfson* (1968) 68 Cal.2d 336, 343, fn. 2.) “[I]f a condition terminating a contract may occur within one year of its making, then the contract is performable within a year and does not fall within the scope of the statute of frauds. This is true even though performance of the contract may extend for longer than one year if the condition does not occur.” (*Foley, supra*, 47 Cal.3d at p. 673.)

At the time Jerry’s agreement to repay the trust was made, it could have been performed within one year if Lucille had died and distribution of the assets of the trust had occurred within that time. Consequently, the oral agreement was not invalidated by Civil Code section 1624, subdivision (a)(1). Ronald’s testimony that Jerry agreed to repay the amounts advanced out of his share of the trust was uncontradicted. The credibility of that testimony was a matter for the trial court’s determination. (*Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170.) Its conclusion that Jerry’s share of the trust was subject to offset was supported by substantial evidence, and we will not disturb it on appeal.

Appellants’ statute of limitations argument is without merit. The statute of limitations does not begin to run until a cause of action has accrued. (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1582.) A cause of action for breach of contract accrues when the wrong has been done, i.e., when the contract has been breached. (*Ibid.*) Jerry agreed to repay the debt out of his share of the trust. Thus, he had no obligation to pay, and could not have breached the agreement, until the assets of the trust were distributed or at least allocated to the individual beneficiaries. Since that did not occur prior to the filing of Ronald’s petition for approval of his accounting, the statute of limitations on a claim for nonpayment of the debt did not run prior to the filing of the petition.

Likewise, appellants’ claim that Ronald should have demanded payment from Jerry prior to his death is without merit. Such a demand would have been inconsistent

with Jerry's agreement to repay. Payment was not due until distribution or allocation of the trust assets, which did not occur prior to Jerry's death.

V. Approval of Trustee's Account

Appellants assert Ronald, as trustee, had a duty pursuant to Probate Code sections 16006 and 16007, to manage the trust property and make it productive. They contend he violated his duties by allowing the lessee (Ronald) to discontinue his payments to the trust for his lease of the real property and accounting for the income and expenses of the real property as if the sale of appellants' interests in the property pursuant to the option had been completed.

The trustee has a duty to administer the trust according to the trust instrument. (Prob. Code, § 16000.) "If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries." (Prob. Code, § 16003.) "The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust." (Prob. Code, § 16007.)

The trust instrument permitted Ronald or Theodore, or both, to exercise an option to purchase the interests Roseann and Jerry would otherwise have acquired in Lucille's real property. The trust instrument based the purchase price on the market value of the property "as appraised by an appraiser hired by the Trust." The trustee, on behalf of the trust, was obligated to hire an appraiser and determine the purchase price in accordance with the terms of the option provision. With the assistance of the trust attorney, Ronald did so. Based on that appraisal, Ronald, as beneficiary, exercised his option to buy the interests in the property. The trust instrument provided that the first payment for each of the selling beneficiaries was to be made not later than six months after Lucille's death, with monthly payments thereafter. Ronald complied with that requirement, depositing the first payments for Roseann and Russell in the trust account on February 15, 2008, and

making monthly payments subsequently. He also executed a promissory note and deed of trust for each interest he was purchasing.

Roseann and Russell challenged the option price that resulted from the appraisal. They did not dispute that Ronald validly exercised his option to buy their interests or that he made timely payments toward the purchase. Because of the challenge to the initial appraisal, the trustee obtained a second appraisal; when that did not resolve the dispute, he petitioned the court for instructions.

Because of the dispute regarding price, and because the trust lacked sufficient liquid assets to satisfy its debts and expenses, the trustee did not distribute the trust assets to the beneficiaries. He continued to collect the rent from the tenants renting Lucille's house and to pay the expenses associated with the real property. Beginning on February 15, 2008, however, the trust's accounting allocated all of the income and expenses of the real property to Ronald and Theodore, apportioned 75 percent to Ronald and 25 percent to Theodore. It credited all of the option payments to Roseann and Russell. It deducted from each beneficiary's share of the trust assets one-quarter of the general trust expenses and the debt to the Wentworth trust.

At the time of trial, Ronald, as beneficiary, had done everything the trust instrument required that he do to purchase Roseann's and Russell's interests in the real property. The trust instrument provided that, if Ronald or Theodore, or both, chose to exercise the option to purchase Roseann's and Jerry's interests in the real property, they were required to exercise the option and begin making the required payments within six months of Lucille's death. It contemplated that title to the real property would be distributed to Ronald and Theodore, and the proceeds of the sale of Roseann's and Russell's interests would be distributed to them shortly after exercise of the option. The trust instrument did not anticipate either a dispute about the option price (since it specified the means by which to determine the price) or a lack of funds with which to pay the trust's expenses. Nothing in the trust instrument indicates Lucille intended to require

Ronald to continue to pay rent for the use of Roseann's and Russell's portions of the real property for an extended period after he exercised the option and began making payments toward the purchase of those interests. Substantial evidence supports the trial court's finding that Ronald did not violate any of his duties as trustee; he followed the provisions of the trust instrument and did not favor his own interests over those of the other beneficiaries.

Appellants complain that the accounting charged to all the beneficiaries the fees paid for the services of the trust's accountant and attorney. A trustee may use funds of the trust to pay attorneys and accountants for advice and assistance in performing his duties. (Prob. Code, § 16247; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213.) Appellants cite no facts in the record and no authority indicating there was any impropriety in hiring the attorney or accountant or in charging all the beneficiaries with the cost.

Finally, appellants assert Ronald commingled his own funds with the assets of the trust because, in December 2007 and January 2008, he paid into the trust rent for the first six months of 2008 pursuant to his lease of Lucille's farmland. He paid in accordance with his usual practice of paying rent for six months in January and July. Because of the exercise of the option, however, he ceased paying rent after February 15, 2008, resulting in an overpayment of rent. Substantial evidence supports the trial court's finding that the trustee properly accounted for all funds deposited with the trust, including the overpayment of rent.

VI. Time for Distribution of Trust Assets

Appellants contend the trial court erred in failing to order immediate distribution of the assets of the trust. They assert the trustee's failure to distribute the assets has frustrated Lucille's intent. They focus on language of the trust instrument which states, in subsection (D)(2) of section Fifth: "On the death of the Trustor, except as otherwise

herein provided, the trust shall terminate and all of the trust estate shall be distributed”

A trust terminates when the term of the trust expires. (Prob. Code, § 15407, subd. (a)(1).) “On termination of the trust, the trustee continues to have the powers reasonably necessary under the circumstances to wind up the affairs of the trust.” (Prob. Code, § 15407, subd. (b).) The trustee could not distribute the trust assets immediately after Lucille’s death. The trust instrument “otherwise ... provided” that Ronald and Theodore had six months in which to exercise their options to purchase the interests of Roseann and Russell. The trust was required to obtain an appraisal of the value of the real property in order to determine the price to be paid for Roseann’s and Russell’s interests in the real property. Until that price was fixed, the trustee could not determine how much Ronald was required to pay or how much the trust was required to distribute to Roseann and Russell for their interests. The terms of the trust instrument and the challenge by Roseann and Russell to the value determined by the trust’s appraisal precluded an immediate distribution.

Appellants also ignore the paragraph immediately preceding the language they quote. Subsection (D)(1) of section Fifth provides: “The Trustee shall pay or reserve sufficient funds to pay all expenses of management and administration of the trust estate.” “The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.” (Prob. Code, § 16243.) At the time of Lucille’s death, the trust did not have sufficient liquid assets from which to pay, or reserve the funds to pay, the debts and expenses of the trust. Appellants’ subsequent challenge to the trust appraisal caused the trust to incur further expenses for a second appraisal and to litigate the trustee’s petition for instructions. At the time of trial, the trust still lacked sufficient funds to pay, or reserve funds to pay, the debts and

expenses of the trust. Consequently, the court did not err in declining to order an immediate distribution of the trust estate.

VII. Costs on Appeal

Ronald contends he should be awarded his attorney's fees on appeal pursuant to Probate Code section 17211, which provides:

“If a beneficiary contests the trustee's account and the court determines that the contest was without reasonable cause and in bad faith, the court may award against the contestant the compensation and costs of the trustee and other expenses and costs of litigation, including attorney's fees, incurred to defend the account.” (Prob. Code, § 17211, subd. (a).)

While appellants' challenges to the trial court's judgment are without merit, there is no substantial evidence in the record from which we can conclude the appeal was brought in bad faith. Accordingly, assuming the statute applies to attorney's fees on appeal, we decline to award the trustee his attorney's fees pursuant to its provisions.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

HILL, J.

WE CONCUR:

CORNELL, Acting P.J.

DAWSON, J.